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February 11, 1967

ENDC MEETING

Geneva, February 21, 1967

Background Paper

SIGNIFICANT LEGAL QUESTIONS AFFECTING THE NON-PROLIFERATION TREATY (U)

I. Depositary Governments.

1. With reference to the Non-Proliferation Treaty, the US-Soviet language provides: "Instruments of ratification and instruments of accession shall be deposited with the Governments of _____, which are hereby designated the Depositary Governments." The depositaries have responsibilities for accepting such papers if they are from "states" for the treaty is open to "all states." Thus, a GDR accession, for example, will be accepted by the Soviet Union but rejected by the US if current practices are followed. The Depositary Governments are otherwise largely record keepers, but considerable prestige nevertheless will attach to being a Depositary Government.

2. The Limited Test Ban Treaty has three depositaries: the UK, the USSR and the US. A majority of the depositaries (US and UK) therefore rejected the GDR's attempt to become a party. This was an important consideration to the FRG. The US first proposed the same three depositaries for the non-proliferation treaty. The Soviets asked to leave a blank space instead of listing depositaries, in the event France might possibly wish to become a party and be offended if only the US, the UK and the USSR were listed. We agreed to leaving the blank open with the understanding between the US and Soviet Union that if France did not become a party and

a depositary, only the test ban depositaries (UK, US and USSR) would be named.

3. Whether we could persuade the Soviets to agree to India, Japan or any other near-nuclear country becoming a depositary is not clear. Having perhaps five depositaries would be cumbersome procedurally and, depending on those selected, could enhance the risk that a majority would accept a GDR instrument of accession. But this would appear a relatively small price to pay, if it actually was responsible for accession to the Treaty by, for example, India. Because of the risks, however, we should not attempt to expand our understanding with the Soviet Union as to the list of depositaries until we see whether that is necessary to gain accession by the important "near-nuclear" states.

4. The FRG will probably wish us to make a statement after the treaty is tabled to the effect (1) that the "all states" accession clause was adopted because of exceptional circumstances favoring broad geographical coverage; (2) that its adoption here does not mean the clause is suitable in other circumstances; and (3) that its adoption does not bring about recognition or otherwise alter the status of any unrecognized regime or entity which may seek to file an instrument of accession to the treaty. We should tell the FRG when this is raised that we will of course be prepared to make the same sort of statement that was agreed upon for the space treaty.

II. When does treaty become operable -- Entry into force procedures.

1. US-Soviet language provides: "This Treaty shall enter into force after its ratification by all nuclear-weapon States signatory to this Treaty, and _____ other signatories to this Treaty and the Deposit of their instruments of ratification."

2. We have agreed informally with the Soviets that before deciding how this blank should be filled in, the US and the USSR would see which states are prepared to become signatories. We have also suggested that the US and USSR should have an informal understanding that neither deposit its instrument of ratification until they had consulted together and decided that the non-nuclear-weapon states each wanted to have as parties had in fact become parties.

3. Since it may take a while for all the important "near-nuclear" states like India to become parties, a considerable period will probably elapse before the US and the Soviet Union deposit their instruments of ratification. How soon the draft treaty should be submitted to the Senate in this waiting period cannot be decided at this point. That will depend on how best to apply pressure on any hesitating non-nuclear states, on the Senate's calendar at the time, and on other considerations. At least two procedures are available: The first is to submit the treaty to the Senate for its consent immediately, telling the Senate that the President will not ratify until certain non-nuclear states do so. This course of action might result in a provision in the Senate resolution granting consent that expressed the Senate's understanding that the President would not ratify until these states had done so. This course might also result in the Senate itself waiting to see what non-nuclear countries ratified.

The second alternative would be to hold up submitting the treaty to the Senate until we are confident that the right non-nuclear countries are going to become parties.

III. Reservations or Conditions to Treaty.

1. The agreed US-Soviet language to Article V does not contain any express limitation on reservations. Generally, absent such limitations, the ability of a state to adhere to multilateral agreement pursuant to a reservation is

dependent upon the nature of a reservation (which must be consistent with the purposes and objectives of the provisions of the agreement), as well as the surrounding negotiations. Any substantive reservation may, however, complicate obtaining widespread adherence to the treaty. Any discussions with other delegations concerning possible reservations should bear this in mind.

2. Under U.S. practice, the Executive Branch would notify to the Senate any reservation made by a state prior to the treaty's submission to the Senate. If the reserving state's accession follows U.S. ratification, the reservation will be submitted to the Senate only if the Executive Branch decides that it is of sufficient substantive import to warrant the Senate's attention.

UNDERSTANDINGS and OTHER STATEMENTS

1. Some states may sign, ratify, or accede to the treaty subject to "understandings," "statements" or "declarations" which may not be true reservations. The substance of the statement is the key. The United States has defined these terms as follows:

" 'Understanding' is used to designate a statement when it is not intended to modify or limit any of the provisions of the treaty in its international operation, but is intended merely to clarify or explain or to deal with some matter incidental to the operation of the treaty in a manner other than a substantive reservation. Sometimes an understanding is no more than a statement of policies or principles or perhaps an indication of internal procedures for carrying out provisions of the treaty. The terms 'declaration' and 'statement' when used as the descriptive terms are used most often when it is considered essential or desirable to give notice of certain matters of policy or principle, but without any intention of derogating in any way from the substantive rights or obligations as stipulated in the treaty." (U.S. Statement in A/5687 Depositary Practice in Relation to Reservation, Rep't of the Sec'y Gen. 39-40 (1964).)

DEPOSITARY's DUTY FOR RESERVATIONS and other STATEMENTS

Under paragraph 4 of Article V of the agreed language of the Treaty, provision is made for ratification and accession subsequent to entry into force. If a state making an accession does so with a reservation, paragraph 5 of the agreed language requires the Depositary States to inform the other states of "any requests for convening a conference or other notices."

It is the practice of the U.S. to inform all interested states of the terms of a reservation after its deposit with the signature, ratification, or accession. Notification is usually accompanied by a request for a statement as to the

State's attitude with respect to the reservation. The U.S. follows general international practice, and paragraph 5 of the treaty is merely an articulation of that practice. Once notification of a reservation is given, a reasonable amount of time must be allowed for states already parties to indicate their objection. Generally, 12 months after notification is considered a reasonable time.

IV. Duration, Review, Amendments and Withdrawal Clauses.

The non-nuclear countries will probably object to signing a non-proliferation treaty of unlimited duration containing no obligations upon the nuclear-weapon powers to halt the nuclear arms race within any specified period. The review clause, however, provides for an automatic conference at the end of five years to review the operation of the treaty "with a view to assuring that the purposes and provisions of the Treaty are being realized." We have advised some of our allies that at this conference the non-nuclear-weapon states can call upon the nuclear-weapon states to show whether the treaty is living up to its stated purpose of leading toward the easing of tensions and the facilitating of disarmament rather than merely being a step to preserve nuclear monopoly.

The review clause does not provide for termination at the end of five years and we should oppose any proposal for such a provision. The 1966 Eight-Nation Joint Memorandum urged that periodic review be provided for. The conferees at the first conference could, of course, agree to meet again at any particular time. No treaty amendment would be necessary for that. And there is no need to establish an inflexible and automatic requirement for review every five years or the like.

Any amendments flowing from the review clause would require the votes of a majority of the parties, including all nuclear-weapon parties. Non-nuclear-weapon states may object to this nuclear power veto. However, we could probably not secure Senate consent to a non-proliferation treaty amendments clause without a U.S. veto. We should oppose any such clause on the ground that neither the U.S.

nor the Soviet Union could accept it, and that what is proposed is no more than what appears in the 1963 limited test ban treaty.

The draft treaty not only provides for review after five years and amendments at any time, but also for withdrawal whenever, in the judgment of the withdrawing party, extraordinary events, related to the subject matter of the treaty, jeopardize its supreme national interests. These provisions, taken together, provide a great deal of flexibility for the protection of the interests of non-nuclear-weapon states.

V. Questions Concerning the GDR.

The probable signature of the GDR to the NPT presents questions that may be raised in the course of the ENDC. Questions and suggested responses follow:

1. If the GDR takes steps to become a party to the treaty does that imply recognition of it by the US?

NO. In international law recognition of an entity as a state or a regime as a government is a matter of intent. The act of subscribing to a multilateral agreement also signed by an unrecognized entity, does not amount to recognition. We have made statements to this effect in connection with the Limited Test Ban Treaty and the treaty on Outer Space. A formal statement of the Department of August 2, 1963, with reference to proposed GDR signature of the Test Ban Treaty stated:

> "We understand the Federal Republic's concern that this treaty should work no recognition or change in status for East Germany . . .
>
> "Under Secretary Harriman and his advisers had this problem very much in mind during the negotiation of the treaty.

". . ./I_/t is a well-established proposition of international law that recognition is not accorded to an unrecognized regime when that regime acts to become a party to a multilateral treaty, along with states that do not recognize it. Similarly, such action by an unrecognized regime does not result in any recognition or acknowledgment of the existence of the state which the regime purports to govern."

Secretary Rusk, in his testimony before the Senate stated:

"It has been suggested that, by the act of subscribing to the treaty, a regime might gain recognition by parties to the treaty that do not now recognize it. No such effect can occur. In international law the governing criterion of recognition is intent. We do not recognize, and we do not intend to recognize, the Soviet occupation zone of East Germany as a state or as an entity possessing national sovereignty, or to recognize the local authorities as a government. These authorities cannot alter these facts by the act of subscribing to the test ban treaty.

In a statement of December 17, 1966 to the General Assembly, Ambassador Goldberg commenting on the accession clause of the Space Treaty stated:

"The adoption of the accession clause now included in the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space -- urged because of exceptional circumstances favoring a very broad geographical coverage for the Space Treaty -- does not, of course, bring about the recognition or otherwise alter the status of an unrecognized regime or entity which may seek to file an instrument of accession to the Space Treaty. Under international law and practice, recognition of a Government or acknowledgment of the existence of a state is brought about as the result of a deliberate decision and course of conduct on the part of a government intending to accord recognition. Recognition of a regime or acknowledgement of an entity cannot be

inferred from signature, ratification or accession to a multilateral agreement. The United States believes that this viewpoint is generally accepted and shared, and it is on this basis that we join in supporting the present final clauses of the Space Treaty."

The NPT, like the Limited Test Ban Treaty and the Space Treaty, will contain a clause opening the treaty to signature by "all states." Since this is an arms control agreement of universal importance and concern, it has been decided to attempt to obtain the widest possible acceptance of the treaty.

The US is party to a number of agreements to which the GDR has also affixed its signature, such as the Geneva Convention of 1949, the Limited Test Ban Treaty, and the Outer Space Treaty. This has never been interpreted as recognition of or an act towards recognition of the GDR.

2. Will the US permit the GDR to sign or deposit its instrument of ratification in Washington?

NO. This treaty provides for multiple depositaries. As in the test ban treaty no depositary need accept a signature from authorities in a territory it does not recognize as a state. Therefore, the U.S. will not accept the signature of the GDR which it does not recognize. The U.S. will similarly refuse to accept the deposit of an instrument of ratification from the GDR. If the test ban practice is followed the UK will act in the same manner. It is assumed, therefore, that the GDR will deposit its instrument of ratification in Moscow. The US will also refuse to accept notice of signature, ratification or accession by the GDR from the Soviet Union, assuming the Limited Test Ban Treaty precedent is followed, although we may vote, or we did in that case, that the East German regime had signified its intention to be bound.

3. If a state deposits its instrument of ratification or accession with the US subject to a reservation or other statements, does the obligation of a depositary to "inform all signatory and acceding states of . . . other notices" require the US to inform the GDR?

NO. There is no obligation with respect to entities whose "statehood" we do not recognize.

4. If the GDR attempts to attend the conferences that are provided for in Article IV would the US object? Further, would such attendance constitute recognition of the GDR?

With regard to the first part, the answer is as follows. The US has told the FRG that

> "With respect to conference problems, the language of Article IV, paras. 1 and 2 providing for possibility of a conference on amendments is derived from the limited test ban treaty. Secretary Rusk testified in 1963 that 'we preserve our right to object' should the GDR subsequently seek to assert privileges under the test ban treaty such as endeavoring to attend an amendments conference. We advised the FRG then that it was our intention to oppose GDR participation and we could not foresee any situation in which we would fail to interpose objection. Unless the FRG has other views, our present thinking with respect to an NPT amendments clause is along the same lines. The same position would, of course, apply to para. 3 of Article IV calling for a review conference."

The answer to the second part is NO. In instructing its delegates to the Seventh International Conference of American States in Montevideo in 1933 the Department stated:

> "It is well established . . . both in theory and in practice, that participation in an international conference does not affect the status of recognition or nonrecognition of a participating government." (2 Whiteman 546 (1963)).

When Communist China and North Korea attended the conference held in Geneva on reaching a peaceful settlement in Korea, the US again made it clear that invitation to attend a conference did not in any way imply recognition (2 Whiteman at 547-50) (1963)). The conference was held in accordance with an agreement of the Foreign Ministers of the US, UK, France, and the Soviet Union in Berlin to call such a conference. As he left for the conference in Geneva, Secretary Dulles stated:

> "The conference does not imply our diplomatic recognition of Communist China. On the contrary, the Berlin agreement expressly stipulated that neither the invitation to nor the holding of the conference should imply diplomatic recognition where it is not already accorded. This proviso on which the United States stood absolutely firm was accepted reluctantly by the Soviet Union during the closing minutes of the Berlin conference." (id. at 549).

Similarly the US has held 132 meetings with the Communist Chinese in Warsaw, as well as in other East European capitals, none of which has amounted to recognition (id. 551-554).

When various regimes that the US did not recognize attended the International Red Cross Conference in October-November 1955 the US delegate stated that the conference "was organized on a truly unique, humanitarian, universal, and nonpolitical basis" and did not imply a change in the policy of the United States with respect to such regimes. (37 Dep't State Bull. 904 (1957)).

There is thus ample precedent for the statement that not objecting to an unrecognized regime attending a conference does not in any way amount to or lead towards recognition of that regime.

5. Assume that the treaty obligates non-nuclear-weapon states to undertake to accept IAEA safeguards. The US may be asked to consider a request by the GDR that it is ready to have IAEA safeguards on its nuclear facilities, and that it also wishes to become a member of IAEA.

The following paragraphs contain discussion of some of the legal factors likely to be involved in formulating our position:

a) What has been the US position regarding membership of the GDR in international organizations? b) How do the obligations of the NPT affect the GDR? c) Can IAEA inspections be conducted in states which are not members?

a) The US position on GDR efforts to join international organizations has been clear.

The US has often stated that it considers the GDR to be no more than the Soviet zone of Germany. The US maintains that the GDR is not a sovereign state as that term is defined in international law. The GDR is recognized by fewer than a dozen states, and all of those are communist countries. The Governments of the United Kingdom and France share the views of the United States as do the huge majority of the nations of the world and believe that only the Government of the FRG is entitled to speak on behalf of Germany as the representative of the German people in international affairs. The GDR is not a member of the United Nations or any of the specialized agencies. Membership in the IAEA is open to states that are members of the UN or other specialized agencies and to other states "which deposit an instrument of acceptance of this statute after their membership has been approved by the General Conference upon the recommendation of the Board of Governors." (Art. 4.)

Under the standard that the US has applied, the GDR is not considered a sovereign state, and therefore ineligible for membership in the IAEA.

b) As explained below, the US will presumably take the position, assuming that the limited test ban precedent is followed, that the GDR has assumed obligations under the treaty. These obligations would probably include those of undertaking to accept IAEA safeguards. However, whether the US would wish to take this position explicitly or publicly in view of its probable opposition to GDR membership in the IAEA, would have to be considered later taking into account the positions of other countries, particularly the FRG. Western statements that the GDR is required by the NPT to accept safeguards would almost certainly increase greatly the pressures to find some way of allowing the GDR to participate in the IAEA and perhaps even become a member.

The question of GDR obligations under a treaty arose during the discussions surrounding the Test Ban Treaty. In the hearings held in conjunction with that treaty, Secretary Rusk stated that although we are under no obligation to accept the notification of GDR subscription to the treaty "the East German regime would have committed itself to abide by the provisions of the treaty." (Hearings, at 18).

c) The GDR would as a legal matter, not have to be a member of the IAEA in order to have safeguards applied in the GDR.

It is possible for the IAEA to inspect a non-member. Article XII of the Agency statute states that it can apply safeguards

> "With respect to any Agency project or other arrangements where the Agency is requested by other parties concerned to apply safeguards. . ."

That article further empowers the Agency

> "To send into the territory of the recipient State or States inspectors, designated by the Agency after consultation with the State or States concerned."

Although the IAEA has never conducted inspections on the territory of a non-member, the Statute would empower it to do so. It is not common for an international organization to conduct activities on the territory of a non-member, but it has been done. The UN for example has its European headquarters in Geneva, Switzerland, although Switzerland is not a member of the UN.

There remains also the related question of whether the FRG, in particular, would wish to discourage IAEA inspections in the GDR, even assuming that the GDR could continue to be kept out of the IAEA. The FRG might fear that the presence of international officials in the GDR would result in many "official" acts by the GDR, such as affixing GDR seals and the like to the travel documents of inspectors, with consequent enhancement of the prestige and status of the GDR. Because of the sensitivity of these issues, the US position can probably only be formulated after discussion with the FRG and others.

SUBJECT: Significant Legal Questions Affecting the NPT

DATED: 2/11/67

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